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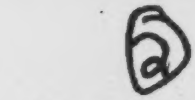

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In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

JAMES HOWARD BENTLEY

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Iowa

BRIEF OF THE STATES OF MISSOURI, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESEE, TEXAS, UTAH, VERMONT, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The question presented by the State of Iowa is of great importance to law enforcement. The amici attorneys general are the chief law enforcement officers of their respective states. In many instances, they represent the state in prosecutions that involve out-of-court statements made by children. In even more instances, the attorneys general are assigned responsibility for appeals that arise from criminal cases in which statements from children were used.

But the question presented is not just important to law enforcement. It is also important to social services, mental health, and medical personnel who deal with the aftermath of child abuse. The states employ such personnel. The attorneys general thus need to know what kinds of statements made by children can be used at a criminal trial not just in order to represent the states in criminal cases, but also to counsel and represent state employees and officials whose roles lie outside the criminal realm.

REASONS FOR GRANTING THE PETITION

1. The question decided by the Iowa Supreme Court is faced in all states.

Every state's courts are faced with the question of the admissibility of child statements. It is critical for those courts to have concrete, uniform guidance – of the sort only this Court can provide – as to how to determine the admissibility of a child's out-of-court statement made to child welfare advocates, such as counselors, social workers, child advocacy center interviewers, mental health professionals, medical professionals, and educators. Because this Court has not spoken on that important question since it decided *Crawford v. Washington,* 541 U.S. 36 (2004), we have seen varying standards and inconsistent results, as described in the Petition.

That there have been a number of cases already addressing the admissibility of child statements post-*Crawford* is hardly surprising. The states have long recognized the necessity of admitting a child's out-of-court statements in certain cases, particularly abuse cases. States have "a strong interest in protecting children, and child abuse presents unusual evidentiary problems because the victim's testimony is often the only direct evidence linking the accused to the crime." *State v. Wright*, 751 S.W.2d 48, 52 (Mo. 1988). For these reasons, a majority of states have enacted, via statute or rule, what is commonly known as a "tender-years" statute, which allows for admission of a child's out-of-court statements provided certain criteria are met.[1]

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[1] *See, e.g.*, Ala. Code 1975 §§ 15-25-31 and 31 (West 1995); Alaska R. Evid. 801(d)(3); Alaska Stat. § 12.40.110 (Lexis 2006) (only applies to grand jury testimony); Ariz. Rev. Stat. Ann § 13-1416 (West 2001); Ark. R. Evid. 803(25); Cal. Evid. Code § 1228 (West 1995); Colo. Rev. Stat. § 13-25-129 (1998) (held unconstitutional in *People*

Such rules or statutes reflect "a policy determination that in some child abuse cases the victim's out-of-court statements may possess sufficient probative value to contribute to the judicative process." *Wright*, 751 S.W. 3d at 52. "[I]ndeed, such statements may on occasion be *more* reliable than the child's testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial." *Id.* (emphasis in original). Thus, prior to this Court's decision in *Crawford*, a child's statements to a social worker, a counselor, or a mental health care provider, or to an interviewer at a children's advocacy center, were generally deemed admissible, assuming there were sufficient indicia of reliability. Indeed, this Court itself recognized the admissibility of some such statements in *Idaho v. Wright*, 497 U.S. 805 (1990), and allowed their admission in *White v. Illinois*, 502 U.S. 346 (1992).

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v. Moreno, 160 P.3d 242 (Col. 2007) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)); Del. Code Ann. Tit. 11, § 3513(a) (2007) (providing for videotaped deposition instead of live testimony); Fla. Stat. Ann. § 90.803(23) (2007); Ga. Code Ann. § 24-3-16 (1995) (held unconstitutional in *Woodard v. State*, 496 S.W.2d 896 (Ga. 1998)); Haw. R. Evid. 804(b)(6); Idaho Code § 19-3024 (Michie 2004); 725 Ill. Comp. Stat. Ann. 5/115-10 (West 2002); Ind. Code Ann. § 35-37-4-6 (Michie 1998); Iowa Code Ann. § 232.96 (West 2006) (only applies to child protective proceedings); Kan. Stat. Ann § 22-3433 (2005); Md. Code Crim. Proc. § 11-304 (Lexis 2001); Mass. Gen. Laws Ann ch. 233 § 81 (Lexis 2000); Mich. R. Evid. 803A; Minn. Stat. Ann. § 595.02 (West 2000) (providing for testimony via closed circuit television); Miss. R. Evid. 803(25); Mo. Rev. Stat. § 491.075 (2000); Nev. Rev. Stat. § 51.385 (2000); N.H. Rev. Stat. Ann. § 516:25-a (2007) (only applies to civil suits for damages arising out of child sexual abuse); N.J. R. Evid. 803(27); N.D. R. Evid. 803(24); Ohio R. Evid. 807; Okla. Stat. Ann. Tit. 12 § 2803.1 (West 1993); 42 Pa. Cons. Stat. Ann. § 5985.1 (West 2000); R.I. Gen. Laws § 11-37-13.1 (2002); S.C. Code Ann § 17-23-175 (2007); S.D. Codified Laws § 19-16-38 (2007); Tex. Crim. Proc. Code Ann. § 38.072 (West 2005); Utah Code Ann. § 76-5-411 (2003); Wash. Rev. Code Ann. § 9A.44.120 (West 2000); Wis. Stat. Ann. § 908.08 (2007).

In *Crawford*, the Court adopted a new framework for adjudicating the admissibility of out-of-court statements under the Confrontation Clause, holding that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. Simply put, under *Crawford*, "testimonial" statements are no longer admissible unless the witness takes the stand or the defendant has had a prior opportunity to cross-examine the witness.

The issue for prosecutors and the courts becomes, then, what constitutes a "testimonial" statement. This Court did not adopt a definition of "testimonial" in *Crawford*. In fact, this Court specifically stated that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" fully aware that this would create uncertainty. *Id.* at 68, n. 10. Rather, this Court merely stated that the term "testimonial" applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. This Court noted that these were "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68.

But inasmuch as a child's statement to a social worker, children's advocacy center interviewer, medical professional, or mental health professional does not constitute prior testimony in a court proceeding or a police interrogation, the uncertainty remains as to whether such a statement is "testimonial" for the purposes of *Crawford* and the Confrontation Clause. Moreover, in *Crawford*, this Court did not expressly overturn *Idaho v. Wright* and *White v. Illinois*, under which at least some such out-of-court statements were admissible. Given the apparent continued validity of *Idaho v. Wright* and *White v. Illinois,* and the limited

holding in *Crawford*, state courts across the country have been and will continue to be faced with the question of how to determine whether a child's out-of-court statements to child welfare advocates is "testimonial."

The impact of the issue is obvious in the 30 states where the courts have tackled the issue in cases involving various kinds of interviewers – and have reached contradictory holdings.[2] But the issue will

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[2] In the following cases, the court held that the statement was testimonial: *T.P. v. State*, 911 So.2d 1117 (Ala. Crim. App. 2004) (holding that statements to social worker and forensic evaluator were testimonial; however, any error was harmless in light of the defendant's admissions); *Seely v. State*, --- S.W.3d ---, 2007 WL 2781965 (Ark. App. 2007) (holding that statements to social worker were testimonial, but that statements to mother were not testimonial); *People v. Sisavath*, 118 Cal.App.4th 1396 (2004) (holding that statements during an interview at a multi-disciplinary interview center were testimonial); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006) (holding that statements to private forensic interviewer were testimonial); *Hernandez v. State*, 946 So.2d 1270 (Fla. App. 2007) (holding that statements to nurse were testimonial); *State v. Hooper*, --- P.3d ---, 2007 WL 4472263 (Idaho 2007) (holding that statements to forensic examiner were testimonial); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) (holding that statements to clinical specialist and school social worker were testimonial; however, statements to mother were not testimonial); *Agilera v. State*, 862 N.E.2d 298 (Ind. App. 2007) (holding that statements to forensic interviewer were testimonial, but that their admission did not violate the confrontation clause because the child testified at trial); *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) (holding that statements to counselor at Child Protection Center were testimonial); *State v. Henderson*, 160 P.3d 776 (Kan. 2007) (holding that statements to social worker and detective were testimonial); *State v. Kennedy*, 957 So.2d 757 (La. 2007) (holding that statements to Children's Advocacy Center worker were testimonial, but there was no confrontation violation because the child testified at trial); *Snowden v. State*, 867 A.2d 314 (Md. 2005) (holding that statements to social worker were testimonial); *Williams v. State*, 970 So.2d 727 (Miss. App. 2007) (holding that statements to forensic interviewer at a Family Crisis Center were testimonial, but their admission was not harmful because the victim

inevitably be presented in the other states as well. In fact, out-of-court statements by children to counselors and others have already come before the appellate courts

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testified at trial); *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006) (holding that statements to social worker and Children's Advocacy Center interviewer were testimonial); *State v. Buda*, 912 A.2d 735 (N.J. Super. A.D. 2006) (holding that statements to worker from Department of Youth and Family Services were testimonial); *Flores v. State*, 120 P.3d 1170 (Nev. 2005) (holding that statements to child protective services investigator were testimonial); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (holding that statements to forensic interviewer were testimonial); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006) (holding that statements to director at Child Advocacy Center were testimonial); *State v. Neese*, 2006 WL 3831387 (Tenn. Crim. App. 2006) (holding that statements to interviewer at Children's Advocacy Center were testimonial); *State v. Hopkins*, 154 P.3d 250 (Wash. App. 2007) (holding that statements to Child Protective Services workers were testimonial but that statements to family members were not testimonial).

A strong minority of courts, however, have found this type of statement to be non-testimonial and therefore admissible: *State v. Arroyo*, 935 A.2d 975 (Conn. 2007) (holding that statements to licensed social worker were not testimonial); *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006) (holding that statements to emergency room doctor were not testimonial); *People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) (holding that statements to Children's Advocacy Center director were not testimonial); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007) (holding that statements to nurse were not testimonial); *State v. Spencer*, 169 P.3d 384 (Mont. 2007) (holding that statements to counselor and foster parent were not testimonial); *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) (holding that statements to doctor for purposes of medical diagnosis were not testimonial); *State v. Brigman*, 632 S.E.2d 498 (N.C. App. 2006) (holding that statement to doctor was not testimonial where 2-year-old would not know statement would be used later at trial); *State v. D.H.*, 2007 WL 3293361 (Ohio App. 10 Dist. 2007) (holding that statements to social worker at Children's Advocacy Center were not testimonial); *Commonwealth v. Allshouse*, 924 A.2d 1215 (Pa. Super. 2007) (holding that statements to Children and Youth Services worker were not testimonial); *Lollis v. State*, 232 S.W.3d 803 (Tex. App. 2007) (holding that statements to counselor were not testimonial).

in post-*Crawford* cases in seven more states, though there the courts have been able to avoid deciding it.[3] There is no realistic hope that the courts in those states will be able to postpone indefinitely addressing the issue, nor that courts in the remaining 13 states will be able to avoid having to address it. And given the conflict among the states, there is no real hope for a consistent nationwide rule absent guidance from this Court.

2. In order to properly protect and treat abused children, the states need to know the rules regarding interviews.

Interviews such as those conducted by St. Luke's Child Protection Center in this case are critical for the proper protection and treatment of abused children. But interviews about sensitive topics, by whomever conducted, are often difficult for children. Professionals at children's advocacy centers explain some of the things that make interviews difficult:

> The child might be afraid to tell because the abuser hurt or threatened to hurt the

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[3] *See, e.g.*, *Randall v. State*, 907 A.2d 146 (Del. Supr. 2006) (holding that statements were admissible where child testified and defendant opted not to cross-examine); *Starr v. State*, 604 S.E.2d 297 (Ga. App. 2004) (holding that statements were admissible where child did not testify but was present and available at trial); *State v. Tailo*, 2007 WL 4226066 (Haw. 2007) (holding that statements were admissible where child testified at trial); *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006) (holding that statements were admissible because *Crawford* not applicable to termination of parental right cases); *In re P.F.*, 118 P.3d 224 (Okla. Civ. App. 2005) (holding that statements were inadmissibile for statutory reasons); *State v. Carothers*, 724 N.W.2d 610 (S.D. 2006) (holding that statements were admissible where child was available to testify at trial); *State v. Tester*, 895 A.2d 215 (Vt. 2006) (holding that statements were admissible where child testified at trial).

> child or family members. The abuser might have also threatened to hurt [themself] if the child tells. Children might think if they tell they will be taken away from their family or have to move. Children are also sensitive to others and might not say something because they don't want their family to feel sad or angry about the abuse. Some children believe the abuser loves them and/or they don't want to lose their relationship. The child might also keep the abuse a secret because the abuser made them promises or gave them gifts or rewards so they wouldn't tell anyone about the abuse. Other children might believe the abuse is normal. They may also feel too ashamed or embarrassed to tell anyone about the abuse.

Chicago Children's Advocacy Center, *What to Do If You Suspect a Child Is Being Abused*, http://www.chicagocac.org/index.php/resources/what_to_do_if_you_suspect_a_child_is_being_abused, last accessed on February 6, 2008.

Children's advocacy centers were created, in part, to address those difficulties. The centers facilitate disclosure by children and successful intervention on behalf of those children who have, in fact, been abused. Children's advocacy centers were created in recognition that "child abuse is a multifaceted community problem and no single agency, individual or discipline has the necessary knowledge, skills or resources to serve the needs of all children and their families." The National Children's Advocacy Center, *The CAC Model*, http://www.nationalcac.org/professionals/model/cac_model.html, last accessed on February 6, 2008 ("*The CAC Model*"). Thus they provide child-focused programs

where representatives from many disciplines – child protection, mental health, medical, victim advocacy, as well as law enforcement and prosecution – work together, conducting joint interviews and making team decisions about the investigation, treatment, management, and, potentially, prosecution of child abuse cases. *See id.* "They also share a belief that the combined wisdom and professional knowledge of professionals of different disciplines will result in a more complete understanding of case issues and the most effective, child and family-focused system response." *Id.* Children's advocacy centers employ a multi-disciplinary approach that provides victims and their families with medical services, social services, and legal services to deal with the trauma of abuse. *See id.*

"The primary goal of all [children's advocacy centers] is to ensure that children are not further victimized by the intervention systems designed to protect them." *Id.* The centers and the professionals who work therein strive to develop a program that responds to allegations of child abuse in a way "designed to meet the needs of children and their families in a specific community." *Id.* Thus, the centers serve the child, as the team's primary concern is to act in the best interest of the child. Chicago Children's Advocacy Center, *Mission and Vision*, http://www.chicagocac.org/index.php/about/mission_vision, last accessed on February 6, 2008.

The interview is an essential part of this program. It is conducted by a professional, who is trained in the particulars of successfully interviewing children. Experts in child sexual abuse investigations agree that "[a] well-trained and experienced forensic interviewer ... should conduct the investigation [because t]his will yield more informative and accurate accounts by children." Susan Sachsenmaier, *Investigating Child Sexual Abuse Allegations: Do Experts Agree on Anything?*, http://www.aaets.org/article50.htm (The American Academy of

Experts in Traumatic Stress, Inc., 1998). Interviews performed by a children's advocacy center serve the needs of treating physicians, treating therapists, and civil child protection professionals, as well as potentially, but not necessarily, serving the needs of prosecutors. The interview is designed to prevent "trauma to the child caused by multiple, duplicative contacts with different professionals." *The CAC Model*, *supra*.

Before the advent of children's advocacy centers, sexually abused children often had to tell their stories over and over – repeatedly reliving the trauma of their abuse. Research shows that in Chicago, for example, a child would have to retell what happened to him or her an average of 16 times. Chicago Children's Advocacy Center, *Before the CCAC: A Broken System*, http://www.chicagocac.org/index.php/about/history/before_the_ccac_a_broken_system/, last accessed on February 6, 2008. By allowing the involvement of law enforcement personnel behind the scenes, children's advocacy centers significantly reduce the number of potentially traumatic interviews – and thus enhance the ability of state employees and others to treat abused children.

And the extent of the need for medical, mental health, and other non-prosecutorial intervention is staggering. In 2005, an estimated 899,000 children were the victims of abuse or neglect; 9.3% (over 83,000) of these were sexually abused. Children's Bureau, *Child Maltreatment* (2005), available at http://www.acf.hhs.gov/programs/cb/pubs/cm05/chapterthree.htm, last accessed February 6, 2008. The overall victimization rate of children is inversely related to the age group of the child, with younger children being the most likely group to be victimized. *Id.* Early identification of sexual abuse victims is crucial "to the reduction of suffering of abused youth and to the establishment of support systems for assistance in pursuing appropriate psychological development and

healthier adult functioning. As long as disclosure continues to be a problem for young victims, then fear, suffering, and psychological distress will, like the secret, remain with the victim." N. Faulkner, *Sexual Abuse Statistics*, http://www.prevent-abuse-now.com/stats.html #Substantiated, last accessed February 6, 2008.

Communities with children's advocacy centers report "more immediate follow-up to child abuse reports; more efficient medical and mental health referrals; reduction in the number of child interviews; increased successful prosecutions; and consistent support for child victims and their families." *The CAC Model*, *supra*. That communities with children's advocacy centers report "increased successful prosecutions" does not change the fact that those centers and the interviews they conduct perform an important role in treatment. Each center "ensures that children receive child-focused services in a child friendly environment - one in which the needs of children and families come first." *Id*.

St. Luke's Child Protection Center, the children's advocacy center involved here, is but one of nearly 700 children's advocacy centers in the United States. Such centers are found in literally every state of the union and in the District of Columbia. *See* National Children's Alliance, *Current Listing of Member Children's Advocacy Centers*, http://www.nca-online.org/pages/page.asp?page_id=3999, last accessed on February 6, 2008. Since 2004, there have been nearly 500 reported decisions, civil and criminal, in which children's advocacy centers were referenced or involved.[4]

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[4] A date limited Westlaw terms and connecters search in the all state cases database using the search string "Child Advocacy Center" resulted in a list of 449 documents. Among the most recent *M.R.D. v. T.D.*, --- So.2d ---, 2008 WL 203761 (Ala. Civ. App. 2008) (termination of parental rights); *People v. Sandefur*, --- N.E.2d ---, 2007 WL 4593193 (Ill. App. 4 Dist. 2007) (sexual abuse and sexual

Children's advocacy centers such as St. Luke's, as well as myriad other methods of bringing treatment teams and law enforcement together, help communities across the country address the moral imperative of protecting the nation's most vulnerable citizens from abuse. The interviews they perform are indispensable tools in the assessment and treatment of abused children. Those performing such interviews need to know – as soon as possible, and with specificity – just how much and in what ways they can involve law enforcement personnel. To answer that they cannot involve law enforcement personnel at all would be very troubling. But the existing uncertainty may have the same impact: requiring mental health, social services, and child care professionals to abandon their goal of crafting the interview process in the manner best suited to serve the needs of children.

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assault); *Potter v. Greene*, ---So.2d ---, 2008 WL 131993 (Miss. App. 2008) (child custody); *Zukowski v. State*, 2008 WL 110096 (Tenn. Crim. App. 2008) (child rape).

CONCLUSION

For the reasons stated above, the Court should grant the Petition.

Respectfully submitted,

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